

FOR EVERY JUSTICE, JUDICIAL DEFERENCE IS A SOMETIME THING

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"Deep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instinct and emotions and habits and convictions, which make the man, whether he be litigant or judge."

—Benjamin N. Cardozo

For more years than I care to contemplate—nigh onto thirty—I have been teaching and writing about constitutional law with a slant that most of my fellows in the field consider at best unscholarly, at worst downright indecent. According to that slant, to put it briefly and unsubtly, any study of any aspect of constitutional law which leans primarily on the rightness or wrongness or in-between-ness of conflicting political and jurisprudential concepts, pretty much apart from the men who mouth those concepts, is almost wholly worthless for purposes of analysis or prediction or anything else except perhaps argumentation in an atmosphere of academic unreality. Government by judiciary, as Boudin once called it, is—and is most markedly where constitutional questions are concerned—far more a government of men, not laws, than of laws, not men. Nor activism nor self-restraint nor federal-state relationships nor absolute constitutional commands lead a Sutherland to vote against the New Deal, a Brandeis for wage and hour laws, a Frankfurter against state right to counsel, a Black for freedom of assembly—nor do these easy abstract theories explain why each so voted. From John Jay on to Potter Stewart the vote of each Supreme Court Justice, however rationalized à la mode, however fitted afterward into the pigeonhole of some pretty politico-juridical principle, has rather been the result of a vast complex of personal factors—temperament, background, education, economic status, pre-Court career—of whose influence on his thinking even the most sophisticated of Justices can never be wholly aware. Even if Sutherland did believe, quite apart from his *laissez faire* economic creed, in a strongly activist judiciary as a matter of abstract political principle, why did he believe in it, what other values would he sometimes let overweigh it, and again why? Even if Brandeis did believe, quite apart from his sympathy for social legislation, in the abstract propriety of judicial self-restraint, why did he believe in it, when would he sometimes choose to abandon it, and

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why? How can John Marshall's readings of the commerce clause and the contracts clause make any sense, for all his eloquent logomachy, except in terms of his own personal commitment to the commercial-creditor class; and how can Roger Taney's surface inconsistencies in choosing between federal and state supremacy be reconciled except by seeing him as the consistent spokesman of the agricultural, slave-holding South? Only by examining the Justices individually as whole human beings, by probing beneath the protective shell of principles expressed in opinions, to try to find what made or makes each Justice really tick, can past decisions be explained without constant contradiction and future decisions predicted with a surprising degree of accuracy. That, at any rate, has been my maverick approach to the study of constitutional law for more than a quarter century.

And so when the *Georgetown Law Journal* asked me to write "an article examining the extent to which the judiciary should defer to legislative judgment without abdicating its own responsibilities, and the criteria that should be applied in making this determination," my immediate instinct was to politely decline. In the first place, the idea of judicial deference to the legislature is meaningless to me in the abstract; it is even potentially meaningless to me in the particular instance, the specific case, where, in context, a whole host of other considerations may make any sole emphasis or main emphasis on judicial deference or nondeference a forced and futile exercise in conceptual semantics. In the second place, even if I could winnow out of a case or a class of cases that one factor of judicial deference and weigh how much influence I thought should be accorded it on some strange scale for imponderables, who would or ought care, since I am not a judge, what kind of criteria I might come up with? Moreover, in the realm of *is*, not *ought-to-be*, I have already come as close as I think at all useful to outlining in the rough the attitudes of the current Justices toward judicial deference—in this very *Journal*, just three years ago—and to now repeat or plagiarize myself would strike me as silly. Yet the distinguished judges and professors who I am told are also contributing to this issue of the *Journal* will, I daresay, be concerning themselves with the allegedly, or properly, guiding principles that control or ought to control judicial deference and other aspects of judicial review. Hence, I am persuaded to essay a small experiment of a quite different nature. I should like to suggest that a Justice's actual votes, regardless of his explicitly stated reasons, are rarely if ever primarily dictated by, or predictable in terms of, his firm belief or relative disbelief in judicial deference—in short,

that, coming down to cases, the deference question plays a rather indecisive role. For this purpose, I shall examine skeptically, if perforce sketchily, the records on this score of the two current Justices who are generally supposed to hold the strongest and most diametrically conflicting views about deference. I mean, of course, Justice Black and Justice Frankfurter.

For the past twenty-five years, Justice Black has been the Court's most articulate member in specifically scorning deference to legislatures—*where he has wanted to scorn it*. Thus, no one can doubt that Black, had he been on the Court in the early 1930's, would willingly have deferred to the New Deal and its state-enacted counterparts, as the Nine Old Men's majority did not. For this, there are two common and quite inadequate explanations. One, in which I myself have occasionally overindulged, is that Black defers on economic matters while scorning deference on civil liberties. The other, somewhat overlapping and often propounded by Black himself, is that he follows the words of the Constitution, explicit as they are on most civil liberties, but nowhere reads his own views into constitutional words, as did prior Courts with their substantive due process and their pinched construction of the commerce clause. What Black is saying is that he defers to the Constitution, not to any legislature, unless the Constitution—as *he reads it*—does not forbid what the legislature has done, in which case the legislature should have its way. An extreme illustration was Black's early solo effort to overturn half a century of precedent by completely depriving corporations of all judicial protection under the due process clauses, on the ground that a corporation is not a "person." A more nearly successful effort—in which, paradoxically, Justice Frankfurter briefly joined—was to abolish, regardless of alleged "burdens," all Court protection of commerce from state taxes and regulations, in the absence of prior congressional action; this because the Constitution gives federal regulation of commerce to Congress, not the courts. And of course, Black's crusades for jury trial in FELA cases and elsewhere (deference to Congress plus civil liberties), for judicial incorporation of the whole Bill of Rights into the fourteenth amendment (deference to the Constitution—as *he reads it*), and for the absoluteness of the first amendment's guarantees (deference to the Constitution as anyone must read it) are well and widely known.

Now, with all due respect to Justice Black—and I yield to no one in my immense respect for him, as Justice and as man—I simply do not believe that the notion of deference or nondeference to legislative will,

or to constitutional words either, can have been the controlling factor that led Black to any of these stands. He has not blinked at according corporations the status of artificial "persons" in other contexts than the due process clauses. He has not objected to Court interference with state regulation of commerce, in the absence of congressional command, when the state's purpose was racial discrimination, not tax revenue. He has been far less insistent on following the letter of Congress-written law in other circumstances than he has in the jury trial aspects of the FELA and the Jones Act. Despite the magnificent historical scholarship of his *Adamson* dissent, there is respectable historical evidence on the other side; and more significantly, the commands of the first eight amendments scarcely come sharp and clear from the *words* of the fourteenth's due process clause. Finally, as for the verbal absoluteness of the first amendment, which no sane man can deny, my conviction is that Black would vote precisely the same way in cases of free speech and all the rest, even if the amendment's words were less than absolute; indeed, I believe he would do so if the first amendment were repealed, perhaps by reading its guarantees into the due process clause of the fifth! The point is not that Black is sometimes inconsistent—which, like all Justices, he is—or intellectually dishonest, which he most assuredly is not. The point is rather that here the stark words of the Constitution, there an exegesis that puts words into the Constitution, here judicial deference, there judicial nondeference, are used as argumentative tools to make more juridically respectable and intellectually compelling the results that Black wants to reach for essentially quite different reasons. Among the more obvious of these reasons, or motives, are his passionate devotion to personal liberties, his greater concern for the poor than for the rich and for people than for business organizations, and his comparative indifference to the regulatory or tax burdens imposed on either personal or corporate wealth presumably for the general public good. These predilections and others, such as his strong sympathy for labor, were all readily predictable when he came to the Court—from his early background, his hard-won self-education, and particularly the nature of his pre-Court legal and political careers. And his votes on the Court, although always bolstered by an impressive display of legal learning, have been and remain predictable with far greater accuracy from his many-faceted evangelical yet practical humanitarianism, than from any complex of abstract jurisprudential principles.

For almost as many years as Black has openly scorned, as a primary guide to decision, judicial deference to legislatures, Justice Frankfurter

has been the Court's most vocal champion of such deference—*where he has wanted to defer*. Thus, Frankfurter has not infrequently voted to strike down laws which Black has voted to uphold. The congeries of alleged reasons for this is considerably more complicated, coming from the professorial Frankfurter, but no less indecisive at bottom than Black's. There is Frankfurter's concern that the Court not exceed its proper function in the over-all U.S. scheme of government, *as he conceives of that function and that scheme*. While this may carry overtones of deference, as where he considers cases before the Court too political for the Court to handle, it also carries undertones of nondeference, as where he thinks some legislative action mars the structural symmetry of dual sovereignty. There is also his adherence to past constitutional precedent, at least since the bulk of the Holmes-Brandeis dissents were adopted, a few with his articulated blessing, as majority doctrine; and this despite the fact that adherence to such precedent requires at times the flouting of legislative will. There is, further, Frankfurter's oft-stated view that—absent an offense to the federal system or the compulsion of precedent—no law should be branded unconstitutional unless it is clearly unreasonable or some such adjectival synonym; and while this too may sound on the surface like a defense of deference, there have been cases where Frankfurter has found unreason and some of his colleagues have not. Indeed, the very essence of such a judgment—like the Frankfurterian criterion, in somewhat different context, of "conduct that shocks the conscience," by which he means *his* conscience—might well be classified, because the standard is so imprecise and personal, as the very antithesis of judicial deference. What the Frankfurter credo on judicial review adds up to is deference neither to legislatures nor, as Black claims for himself, to the written Constitution. It is deference to a nonexistent blueprint of the U.S. federal system, complete with dual sovereignty and separation of powers, *as he would draft it*; to the precedent of past decisions, *as he considers them compelling*; and to the reasonable-or-unreasonable test, *as he applies it*. And no more than Black's more simply stated rationale does all this constitute a reliable or revealing guide to analysis or prediction of Frankfurter's votes in specific constitutional cases.

For no less than Black is Frankfurter often inconsistent in applying to issues right at hand his self-proclaimed rules for correct judicial conduct. Perhaps the most striking illustration of his nondeference to legislative will, where neither controlling precedent nor unreasonableness has required it, lies in his long leadership of a Court majority, over Black's

repeated protests, in striking down new and various state taxes as "direct burdens" on commerce. While this may be rationalized as in keeping with Frankfurter's concern for a neat dividing line between state and national powers, it is difficult to see how two small taxes on an interstate sale can upset or endanger the federal system any more than can two state taxes on the same income or the same inheritance, both of which Frankfurter has upheld—though he would doubtless lay the inconsistency to the "difference," which in interstate tax matters is no more than a tactical pleading difference between the commerce clause and the due process clause. Indeed, the record here and elsewhere makes clear that Frankfurter, though he would disown the distinction, has championed his judicial version of the old political shibboleth "states' rights" less militantly in economic cases than in those involving civil liberties. From his famous forced-flag-salute dissent, where many think he did protest too much, to his judicial benediction of the jailing, under a New Hampshire subversion law, of a concededly unsubversive mild-mannered minister—and since—Frankfurter has only rarely and sporadically found state infringements on the Bill of Rights so unreasonable or conscience-shocking as to warrant calling them unconstitutional. And yet on the constitutionality of state censorship statutes, he would apparently turn the Court into a case-by-case review board—scarcely a deference to the legislature or its agents or to the sacredness of federal-state dichotomy. And he has gone along, albeit perhaps reluctantly, in the precedent-upsetting desegregation decisions—despite nondeference to state constitutions, much less state legislation, despite dual sovereignty, and despite the fact that these were stark political questions if any ever were. It is in review of federal legislation, however, that Frankfurter's firmly stated belief in deference is said to come into full play; and indeed it is hard to find more than one or two minor instances where he has voted to brand a congressional act unconstitutional. Yet I dare to suggest a few factors which somewhat qualify the significance of this near-perfect record. First, in judging the scope of antitrust laws, tax laws, patent laws and other regulatory measures, Frankfurter, while scorning the sledge-hammer word "unconstitutional," has, more than any other Justice, used the stiletto of statutory interpretation to cut effective regulation to a minimum, often below what Congress clearly intended; the supplementary device of using narrow interpretation explicitly to avoid a constitutional issue is also a Frankfurter favorite; in either case, the result is the same—although the rationale is more superficially deferential—as would be a forthright ruling that the attempted reach of the

statute was unconstitutional. Second, Frankfurter has several times, most notably in his *Dennis* concurrence, refused to strike down claimed congressional violations of the Bill of Rights not just out of deference, but because he says it is up to the people, not the courts, to protect their own liberties; further, if it be argued that Congress is supposed to speak for the people short-term, presumably it is the Constitution that speaks for them long-term; thus, if it is the people's will that matters, Frankfurter's deference and Black's nondeference stand on equal—and equally indecisive—footing. Finally, on the big over-all constitutional issue of our time, national security against individual liberty, Frankfurter has been talking increasingly in case after case about the Court's duty to "balance" one against the other as a basis for decision. Yet what could be less deferential to Congress than to take such a patent policy judgment, without so much as reliance on constitutional guarantees, out of Congress's hands?

As is true of Black's, Frankfurter's votes are subject to neither analysis nor prediction with any degree of accuracy from the complex of jurisprudential principles on which he overtly purports to depend. Again, motivations lie deeper. There is Frankfurter's worship of the Court as an institution—a worship which works in two contradictory ways since, in order to protect its power and prestige, he would have it shrink its own use of its power to a minimum lest outside political forces move, as they have in the past, to cut down its power and depreciate its prestige. There is his vast and somewhat ambivalent adulation both for the British parliamentary system of government and, at least verbally, for the tripartite U.S. scheme—a dilemma which he tends, though with no consistency, to resolve by elevating the legislature to the top spot on the U.S. triangle. There is his preoccupation with form rather than substance, as when he once said: "The history of liberty has largely been the history of the observance of procedural safeguards"; or when, as I have commented elsewhere, he uses Cardozo's phrase "ordered liberty" with the emphasis always on "ordered." If these observations make Frankfurter sound like a man more concerned with governmental patterns and structures than with the plain effect of government action on living human beings, this is precisely true. But this is not to say that his passion for propriety and form is any more the unemotional product of pure reason than is Black's passion for the well-being of men and women—nor is it to say that such passion, any more than Black's, can be encompassed in a set of concepts to guide judicial attitudes; as on the question whether to defer or not defer, it blows now hot, now cold. That Frank-

furter would become the Court's chief champion of order *über alles* might easily have been predicted—and was indeed obliquely predicted in the American Bar Association's support of his appointment—from the formalistic nature of his early background, of his higher education, and of his professorial pre-Court career, in which his favorite course was Federal Jurisdiction. (Since, despite my extravagant and often stated admiration of Justices Brandeis and Cardozo, I have several times been absurdly accused by Frankfurter's friends of anti-Semitism because, for more than a score of years, I have been highly critical of his work as a Justice, I hasten to add that my first reference here is to the traditionally form-encrusted middle-European culture in which he spent his formative years—years whose influence, according to another famous man from Vienna, is ineradicable.) Moreover, Frankfurter's votes on the Court, like Black's, have been and remain far more accurately predictable in light of his personal predilections, of all of which he may not be entirely aware, than in terms of the allegedly impersonal, objective, reasoned rules with which those votes are regularly rationalized.

My small experiment is almost ended. Let me now risk ridicule plus the loss of whatever persuasiveness my heretical analysis may have had up to here by essaying a way-out-on-a-limb exercise in actual prediction. By extending to all nine Justices the same skepticism of stated principles and the same reliance on largely extralegal factors that I have detailed regarding Black and Frankfurter, let me apply this approach to a concrete case which involves, among other constitutional questions, that of deference or nondeference; which has been argued before the Court this term but, as I write on March 15, has not been decided; and which might easily go either way. The case is the Tennessee redistricting case,[†] perhaps the most important to reach the Court since the *Brown* desegregation decision of eight years ago. To state it first flat-footedly, the Court will order the requested redistricting—in whatever way seems to it most feasible—by a vote of five to four. Easiest of the Justices to predict—indeed for anyone to predict—are Frankfurter, who will doubtless use a four-way parlay of political question, federal system, judicial deference and the precedent of his own *Colegrove* opinion; Black, who wrote the militant *Colegrove* dissent; and Douglas, who joined in

[†] The decision was handed down on March 26, 1962. *Baker v. Carr*, 369 U.S. 186 (1962). At Professor Rodell's request, not one word of his article has since been changed. He accurately predicted the decision and the votes of seven out of eight Justices. He erred only on Justice Clark who joined the majority. Justice Whittaker, since retired, did not participate. [Editor's footnote.]

that dissent. Of the six newcomers to the Court since *Colegrove*, Harlan will join his mentor, Frankfurter, as a matter of course; Warren and Brennan, in that order of enthusiasm, will agree less militantly with Black; Clark and Whittaker will silently side with Frankfurter. Thus Stewart will cast the deciding vote, in the sense that his vote will be the least firmly convinced and committed, and that vote—for reasons not basically legal but rather personal and both extra-Court and intra-Court political—will be with Black and for redistricting. *Colegrove*, of course, will be distinguished or, more probably, overruled. To hedge just a little, I should not be too astounded to see either Clark or Whittaker join the majority rather than bolster a lost cause; and should both do so, even Harlan might surprisingly ride along, leaving Frankfurter unbudging and alone. But I shall stick to my prediction of a five-four vote for redistricting—with Stewart probably or Brennan possibly, as the less militant members of the majority, writing the Court opinion. And of course, I could be dead wrong; the infinite variety of quirks and causes that may determine human choice on any matter where man is at the mercy of his own mind are fortunately far beyond the predictive capacity of even the most intricately attuned and adjusted calculating machine. What I do know is that he who would analyze, predict or understand the Supreme Court's constitutional decisions will fare considerably better if he concentrates on that same infinite variety of human factors which make precise prediction impossible, than if he grants face value to such conditioned verbal behavior from the high bench as is illustrated by random and self-rationalizing balderdash about judicial deference to legislative will.